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Supreme Court, U.S.
FILED
FEB 25 2003
CLERK

No. 02-982

In The

Supreme Court of the United States

MIKEL J. DREILING,

Petitioner,

v.

STATE OF KANSAS,

Respondent.

On Petition For Writ Of Certiorari To The Supreme Court Of Kansas

RESPONDENT'S BRIEF IN OPPOSITION

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QUESTION PRESENTED FOR REVIEW

WHETHER THE PETITIONER'S FIRST AMENDMENT RIGHT TO THE FREE EXERCISE OF HIS RELIGION WAS VIOLATED WHEN EVIDENCE PERTAINING TO HIS RELIGIOUS BELIEFS AND PRACTICES WAS ADMITTED AT TRIAL TO SHOW MOTIVE TO COMMIT MURDER.

LIST OF PARTIES

Mikel J. Dreiling, Petitioner; State of Kansas, Respondent.

CORPORATE DISCLOSURE

There are no parent corporations involved, and there are no publicly held companies involved, pursuant to Rule 29.6.

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JURISDICTION

The Judgement of the Supreme Court of Kansas was entered on September 27, 2002. Petitioner invokes this Court's jurisdiction under 28 U.S.C. 1257(a).

CONSTITUTIONAL AND STATUTORY PROVISIONS INVOLVED

U.S. CONST., AMEND. I

Congress shall make no law respecting an establishment of religion, or prohibiting the free exercise thereof; or abridging the freedom of speech, or of the press; or the right of the people peaceably to assemble, and to petition the Government for a redress of grievances.

STATEMENT OF THE CASE

After an eight-week joint trial in Geary County, Kansas (47, 2627, 15; 3, 741), a jury convicted the petitioner, Mikel J. Dreiling, and his sister, Dana Linn Flynn, in November of 1996 of Murder in the First Degree (contrary to K.S.A. 21-3401), Conspiracy to Commit Murder in the First Degree (contrary to K.S.A. 21-3302 and K.S.A. 21-3401), and Conspiracy to Commit Perjury (contrary to K.S.A. 21-3302 and K.S.A. 21-3805). The petitioner was

also convicted of Criminal Threat (contrary to K.S.A. 21-3419). (76, 8970, 1-25; 8971, 1-13) The Kansas Supreme Court upheld petitioner's convictions on September 27, 2002. *State v. Dreiling*, ___ Kan. ___, 54 P.3d 475, 500 (2002). Petitioner seeks review.

The Custody Battle and Sexual Abuse Allegations

The case involved a custody dispute between Dana Flynn and the victim, Randall Sheridan. A brief affair between Dana Flynn and Randall Sheridan produced a child, A.S., born in August of 1985. Sheridan received joint custody of A.S. (55, 4615, 3-10)

In July of 1989, an allegation of sexual abuse was made against the victim by Dana Flynn concerning A.S. (49, 3255, 11-12) Sheridan continued to have visitation with A.S. but his relationship with Dana Flynn became further strained. On July 31, 1989, Dana Flynn was sent a "notice of action" by Social and Rehabilitation Services (S.R.S.) that this first sexual abuse allegation was "unfounded." (56, 4931, 18-22; 79, State's exhibit #49) Dana Flynn was also notified by investigators that there was a concern that A.S. had been coached. (56, 4867, 14-17; 4960, 1-5) The custody battle escalated. (49, 3256, 16-22)

The "Fountain of Life" Church and Prophecies

Dana Flynn had married Steve Flynn in November of 1987. (53, 4093, 21) Dana and Steve had a son, J.F. in January of 1989. (49, 3270, 22-25) Dana and Steve moved to Salina, Kansas shortly after their marriage. (53, 4094, 6-7) After the marriage, Sheridan was allowed visits three days a week with A.S. (53, 4098, 13-17) Shortly after their

move to Salina, Dana and Steve began attending a church, called the "Fountain of Life," led by Jerry Rollins. (53, 4097, 3-5) After the Flynns started attending, Dana Flynn prompted other members of her family to join, including her brother Mikel Dreiling. (53, 4103, 22; See also, brief of petitioner, 2-3) During services, Mr. Rollins spoke in unintelligible vocalizations. (53, 4099, 22-23; 4102, 1-25) He stated that this form of speech was called "speaking in tongues," which was performed at least every other service. (53, 4103, 9-14)

Jerry Rollins claimed that he was an end-day prophet of God. (63, 6692, 13; 60, 6469, 5; 6473, 7-11) Mr. Rollins practiced "prophecy" as God would reveal things to him, and only to him, regarding situations or other people. (63, 6693, 19-22) In late 1987, or early 1988, Jerry Rollins had a revelation about A.S.'s father, Randall Sheridan, stating that God had revealed that A.S.'s father was evil and that the congregation should pray that God would intervene and that something would happen so that A.S. wouldn't be forced to be subjected to every other week visitations with her father. (63, 6697, 1-25; 6698, 24-25; 6699, 1-4)

In the fall of 1988, Jerry Rollins prophesied that Sheridan was evil and that in God's eyes Steve was A.S.'s father. (53, 4128, 5-7) On a later date, Mr. Rollins gave a prophesy stating that Sheridan should not have visitation, because it was not God's will. (53, 4131, 23-25; 60, 6495, 21-23) He was the source of the allegation that Sheridan molested A.S. (65, 6978, 16-22; 6798, 4-8; 6980, 1-9)

In November of 1988, Dana and Steve had marriage difficulty, so they attended counseling with Mr. Rollins. Dana Flynn believed that God told her that Steve had been unfaithful. (53, 4144, 7-23) Dana and Steve Flynn

ultimately divorced in June of 1989. (53, 4146, 12-13) After the divorce, Steve was granted weekend visitations with his son, J.F. (53, 4152, 22-24)

More Allegations of Abuse

In May of 1992, allegations of sexual abuse against Sheridan resurfaced. (49, 3268, 1-5; 54, 4520, 25; 4521, 1-17) Sheridan was upset about the allegations (54, 4535, 3-4) and brought up his concerns about the "Salina situation" and the influence of Dana Flynn, Jerry Rollins, and the "church" over his child. (54, 4535, 5-7; 4553, 20-24) The custody case was still open at the time of Randy's death. (54, 4537, 14-17; 4538, 2-4)

Randy Sheridan was regularly refused visitation so he obtained court-ordered weekly supervised visitation on July 30, 1992. (49, 3272, 25; 3273, 1-3; 55, 5070, 4-8) Sheridan also obtained a court order for evaluations of A.S. and Dana Flynn, with which Dana Flynn did not comply. (55, 4631, 18-25; 53, 4632, 1) Sheridan requested S.R.S. to re-open the sexual abuse file on August 10, 1992. (56, 4873, 19-21) He also brought orders with him directing that S.R.S. should supervise visitations. (56, 4874, 14-22)

On October 20, 1992, the district court found that it was in the best interest of A.S. to get immediate counseling, and directed that a custody evaluation be completed. The counseling was to be completed by Central Kansas Mental Health Center in Salina and all parties were directed to abide by all requests of the evaluator. (57, 5072, 22-25; 5073, 1-21)

Talk of the Devil

Like Sheridan, Steve Flynn was also concerned about the influence of Rollins and Dana Flynn over his son, J.F. Beginning in February of 1992, and continuing into January of 1993, when J.F. was three years old, J.F. made unusual comments to Steve Flynn, including: "Nanny nanny boo boo, you serve the devil"; "Grandma serves the devil"; "Daddy serves the devil"; and, "Hi, you old faggot." (53, 4184, 5-10; 4187, 15; 4187, 20; 4189, 15) Flynn taped some of these comments. (53, 4211, 23-25; 4212, 1-7) He took J.F. to Vanessa Fechter, a counselor, to verify that J.F. was not being molested and to verify the "You serve the devil" comment. (53, 4201, 8-23; 56, 5448, 1-4) Her interviews of J.F. started on September 8, 1992, and they met 14 times. (58, 5453, 17-20; 5453, 1-3) J.F. was very open with Miss Fechter from the period between September and December of 1992. After the murder, he became very afraid and adamant that he would not speak of his mother. (58, 5455, 5-14) Steve Flynn had also contacted S.R.S. (56, 4875, 18-22) and was concerned about physical abuse (bruises) on J.F., and requested an investigation to address concerns about Dana Flynn and Jerry Rollins. (56, 4876, 1-15)

One interview, on December 4, 1992, when J.F. was three years old, was of particular concern. (53, 4210, 5-10) J.F. drew a picture of a devil and asked that she not show the picture to his father, Steve Flynn, because his father was the devil, and stated that his mother had told him that. (58, 5449, 4-12; 5453, 21-23; 5458, 1-2) He also stated that Jerry Rollins did not exist, and the child then hid under the table and told her that he did not want to talk about anything else. (58, 5455, 16-25) After the session, Steve decided not to take J.F. back to Dana Flynn at the end of the weekend visitation. (53, 4210, 20-25) Steve

Flynn, like Sheridan, filed for a change of custody and for court evaluations of Dana Flynn. (53, 4211, 1-9) J.F. also made a comment to his day care provider on January 5, 1993, after the murder, stating, "I don't have a dad anymore. He's just a devil now." (62, 6454, 10-13)

Events Immediately Prior to the Murder

Sheridan obtained the additional services of attorney Robert Pottroff because of his extensive experience in domestic cases. (49, 3278, 3-11) On November 24, 1992, Pottroff filed a Motion to Compel Immediate Custody Evaluation and Motion for Modification of Custody Arrangement. (57, 5122, 7-25; 5123, 12-25; 5124, 1-25; 5125, 1-18; 77, State's exhibit #55) These motions were set for hearing on December 8, 1992, at 1:00 p.m. (57, 5127, 17-23)

On December 1, 1992, Pottroff filed a memorandum in support of this motion (57, 5129, 12-14), which included a detailed time line showing Dana Flynn's failure to comply with orders and factual allegations, to include J.F.'s statements to Steve Flynn about Flynn serving the devil. (77, State's exhibit #45) Pottroff intended to present evidence about the church, and Jerry Rollins' influence. He had 15 witnesses subpoenaed (and others to appear voluntarily) which included Steve Flynn and Rollins' ex-wife, Lee Anne. (57, 5146, 25; 5147, 1-25)

On December 7, 1992, Mr. Pottroff received a telephone call from Larry Livengood, new attorney for Dana Flynn, requesting a continuance. (57, 5149, 4-10) The continuance was granted. (57, 5150, 14-25; 5151, 9-10)

Also on December 7, 1992, Pottroff asked the court to issue a restraining order which would prevent A.S. from coming into contact with Jerry Rollins, with whom Dana Flynn denied having a relationship. (49, 3282, 10-15) The court granted the order over objection. (57, 5160, 1-17; 77, State's exhibit #56, paragraph 7F) This order placed Dana Flynn in a situation where she had to choose between her daughter and Jerry Rollins. This order also included that Sheridan should not be with A.S. without the company of another adult. (57, 5161, 9-11)

Further, on December 7, 1992, Steve Flynn was to return J.F. to Dana Flynn following visitation. Instead, when Steve Flynn arrived at Dana Flynn's residence, he informed her that he was not returning J.F., but would be filing a motion. (53, 4251, 5-13) Approximately two and one half hours after Steve spoke to Dana Flynn, she and her brother, Mikel Dreiling, came to Steve Flynn's place of business. (53, 4252, 2-13) He went outside and was approached by the defendant and Dana Flynn. (53, 4253, 4) Dreiling yelled and walked very quickly towards Steve Flynn. (53, 4256, 2-12) The petitioner stated, "I'm going to see you go down. I'm going to make you go down." (53, 4257, 14-19) Dana Flynn grabbed her brother's arm and said, "Now is not the time." (53, 4258, 8-12) He then turned and spit on Steve's cheek. (53, 4258, 12-13) There was an independent witness to this incident. (56, 4790-4837)

On December 11, 1992, there was to be an unsupervised visitation of A.S. at Sheridan's residence. (49, 3283, 23; 52, 4893, 6-25; 4894, 1-25) Dana Flynn refused visitation as A.S. was crying. (56, 4895, 1-25) Sheridan was agitated and called Dana Flynn names under his breath. (56, 4937, 1-18)

The following morning, at around 4:00 a.m. on December 12, 1992, the Sheridans received two telephone calls at their residence. (68, 7553, 4-7) Judy Sheridan answered the calls. On the first call, the caller was silent. On the second call she heard a male voice say the word "die" or "dead." (49, 3288, 6-23) Randy Sheridan then took the phone out of Mrs. Sheridan's hand and held the phone to his ear. (49, 3289, 12-16) He said, "Why don't you grow up, Mikey?" (49, 3290, 19) He referred to the petitioner as "Mikey." (49, 3350, 12-14) Phone records revealed that these calls were made from the residence of the petitioner. (68, 7528, 15; 7542, 1-9; 7542, 8-21; 7550, 4-25; 7551, 1-9) Pottroff had a discussion with Randy sometime between December 7th of 1992 and December 21st of 1992 concerning a phone call that caused concern to Judy Sheridan. During this conversation Randy stated to Pottroff, "Never mind, I can handle Mikey." (58, 5402, 23-25; 56, 5403, 1-9) Pottroff knew that Steve Flynn also had an incident with "Mikel" but was not aware of who he was. (58, 5404, 13-16)

On December 15, 1992, the S.R.S. worker, Judy Pearce, told Dana Flynn's newest attorney, Larry Livengood, that there was insufficient evidence to proceed on the second sexual abuse allegation. There was, however, a concern that emotional abuse existed, and if confirmed by therapists, Dana Flynn could have the children removed from her home. (56, 4899, 19-25; 1-4)

On December 16, 1992, Mr. Pottroff filed a motion requesting the court to require Dana Flynn to appear on December 21, 1992, and show cause why she should not be held in contempt of court. (57, 5164, 7-25; 5165, 1-13) The next-door neighbors of Jerry Rollins had made a videotape showing that the restraining order concerning Jerry Rollins and A.S. had been violated. (57, 5166, 15-21)

The Sheridans had a visit with A.S. the weekend of December 18, 1992. The S.R.S. worker picked up A.S. from Dana Flynn at a restaurant in Junction City. (56, 4908, 9-16) A.S. was crying. (56, 4908, 17-19) Sheridan then announced that he had an appointment scheduled for A.S. in Manhattan, Kansas, with Dr. Edelman, a psychologist. When they arrived at Edelman's office, Steve Flynn and J.F. were also present. (56, 4915, 12-17; 49, 3303, 9-10) A.S. became very upset, cried, and was fearful when she saw Mr. Flynn. (49, 3304, 6-9) When A.S. was brought into the office she was frightened, out of control beyond a normal temper tantrum, and seemed terrified. A.S. screamed and directed her rage towards her father. (60, 5937, 25; 5938, 1-15) She stated that he was sent by the devil, was evil, and that she wanted to be with her mother. (60, 5938, 11-17) Judy Pearce took A.S. into another room with Dr. Edelman's wife, while at the same time Dr. Edelman spoke with the Sheridans. (60, 5939, 6-13) When Randy Sheridan began to step into the other room, A.S. began to scream and said he was evil and if he touched her she would die. (60, 5941, 14-18)

The Sheridans took A.S. back to Dr. Edelman's office on the morning of Saturday, December 19, 1992. (49, 3309, 20-25) A.S. appeared happy, and hugged her father and Dr. Edelman. (60, 5945, 13-24) Dr. Edelman asked A.S. about the comments she made the night before about her father being sent by the devil, she remembered saying them but stated, "But, it's not true." (60, 5988, 20-22)

At the court hearing on December 21, 1992, neither Dana Flynn nor her attorney appeared. (55, 4638, 1; 4639, 13-17; 57, 5175, 2-14; 49, 3317, 11-18) On the morning of the December 21, 1992, Dana Flynn's attorney contacted Pottroff and indicated he wanted to avoid a court hearing

and desired to get something resolved. (57, 5175, 9-14) In an attempt to resolve matters, Pottroff and Livengood agreed that Randy could take A.S. on the ski trip planned for Christmas from December 22, 1992, through January 2, 1993. Thereafter it was to be a fifty-fifty custody arrangement. (57, 5177, 2-6) Under this arrangement, Sheridan would now have completely unsupervised visitation with A.S. (49, 3283, 2-13) Pottroff placed some stipulations to the arrangements, which included that it be 100% verified that A.S. was not in contact with Jerry Rollins, and that Dana Flynn would complete the custody evaluation. If these two requirements were fulfilled, Sheridan agreed not to file more motions. (57, 5177, 10-25) Pottroff advised Dana Flynn's attorney that regardless of the continuance on December 21, Pottroff was going to proceed in contempt against Dana Flynn. (57, 5178, 12-15) Pottroff and Livengood were to arrange the exact pick-up time and re-delivery time of A.S. for the ski trip the next morning. (57, 5189, 17-18; 5190, 2-6) There was no evidence that Dana Flynn actually agreed to her counsel's representations. In return for Pottroff not objecting to the requested continuance of the hearing, the Sheridans were told they would be allowed to take A.S. with them for the Christmas ski trip. (49, 3320, 6-10) They planned to pick up A.S. on Tuesday, December 22, 1992, and travel to Colorado. (49, 3321, 10-17) The specifics of the exchange of A.S were to be arranged between Pottroff and Livengood. (49, 3320, 23-24)

On December 22, 1992, Pottroff attempted to make contact with Mr. Livengood at 8:54 a.m., but was unsuccessful. (57, 5196, 2-4) Pottroff attempted again at 10:27 a.m. and was also unsuccessful. (57, 5197, 10-13)

Livengood called Pottroff around noon and explained that he was having difficulty getting in touch with his client to work out details. (57, 5202, 3-4) Pottroff advised that his client was at home awaiting a response. (57, 5203, 4-14) Livengood spoke to his client around noon. (51, 3704, 19-22; 3705, 1-15) Sheridan contacted Pottroff between 2:06 and 2:08 p.m. and explained that he was going jogging and would call back when he returned. (57, 5198, 5-24) He never called back. (57, 5199, 9-12) As of 2:30 p.m. on the afternoon of December 22, Pottroff had not received confirmation from Livengood. (49, 3325, 1-5) Pottroff recalled that during his discussion with counsel, there was no debate about return times or stipulations concerning the ski trip, which was very peculiar in light of the contested history of the case. (57, 5205, 107) Randy called Judy at work at approximately 2:30 p.m. (50, 3453, 5) At this time, Sheridan indicated he was going jogging and would call Mrs. Sheridan back at her workplace at 3:30 p.m. with an update from the attorneys. (49, 3325, 5-8) When she did not receive a phone call from Mr. Sheridan, she tried to call home, but there was no answer. (49, 3328, 17-19) Pottroff received a notice that evening that Sheridan was dead. (57, 5200, 16-21; 5200, 24-25; 5201, 1)

The victim was found near his home shortly after 3:00 p.m. on December 22, 1992. (47, 2635, 11; 2636, 1; 2638, 24-25; 2706, 20-21) He had two shotgun wounds to his torso and three lethal shotgun blasts to his head and neck area. (47, 2885, 18) He was dressed in jogging attire (47, 2810, 10-14; 48, 2973, 18-19; 47, 2876, 3) His body was still warm, and the blood at the scene was just slightly coagulated. (47, 2810, 10-24; 3190, 10-11)

The Petitioner Seeks a False Alibi

The petitioner engaged in a well-documented attempt to present false evidence of alibi. (61, 6249, 20-24; 62, 6340, 2-4; 6345, 14; 62, 6337, 17-20; 62, 6340, 2-4; 6345, 14; 62, 6341, 13-15; 62, 6343, 18-25; 6343, 1-15; 62, 6379, 13; 74, 8624, 2-9; 8625, 9-25; 8626-8648; 8652, 25; 8653, 1-15)

There was also an attempt to secure a false alibi for Dana Flynn. (61, 6249, 10-11; 61, 6249, 20-24; 6250, 22-25; 6251, 1-6; 61, 6251, 11-23; 6254, 22-25; 6255, 1; 77, State's exhibit #87; 61, 6260, 3-6; 6261, 6-11; 61, 6256, 2-14; 6259, 17-18; 77, State's exhibit #85; 61, 6263, 23-24; 61, 6264, 2-5)

Perjury Concerning Religious Practices

Because of the prophesies given by Rollins that the victim was a devil and was molesting A.S., the State was interested in his control over the "church" and other evidence about such prophesies, by him or Dana Flynn. Members of the Dreiling family and other present members of the church denied that the practices took place when questioned under oath at investigative and grand jury proceedings: Jennifer Brock (Dreiling) (63, 6780-6784; 66, 7324-7328); Cheryl Cannfield (63, 6785, 7-24); Brenda Arveson (63, 6785, 25; 6786, 1-5); and Norman Dreiling. (63, 6795, 12-18) Past members of the church testified that the practices did take place. (65, 7102, 25; 62, 6467, 1-9; 65, 7158, 2-8; 7160, 5-23; 63, 6694, 13-25; 6695, 1-2; 64, 6900, 18-19; 6902, 8; 65, 6973, 1-10; 53, 4103, 9-14)

Jesse Dunlap attended the Fountain of Life Church. The church held Friday evening prayer meetings at Dana

Flynn's house, which Miss Dunlap and her husband attended only a few times. (64, 6895, 6-18) Dana Flynn told Miss Dunlap that she was worried because A.S. was having nightmares after she had visited her father, Randall Sheridan. (64, 6896, 24-25; 6897, 1-6) When Dana Flynn and Steve Flynn were divorced, Dana Flynn told Miss Dunlap that Steve was evil. (64, 6898, 17-25) In the fall of 1989, Dana Flynn prophesied in church that Stan Arveson, Miss Dunlap's youngest brother who was then married to Brenda Dreiling, would abuse and molest his daughter, Stacy. (64, 6900, 18-19; 6901, 1-7, 6902, 8)

Lee Anne Miller was married to Jerry Rollins from 1979 through 1992. (65, 940, 9) She moved to Salina, Kansas with Jerry in 1986. (65, 6940, 19-23; 6941, 1) Jerry claimed that he was the only prophet for the last days. (65, 6944, 1-2) He used his claim of prophesy to convince Lucille Johnson, a wealthy widow, to buy a church building and a home for Jerry Rollins. (65, 6948, 11-22; 6963, 6-7; 6969, 18-24; 6981, 14-24; 6984, 6-9; 6988, 10-11; 77, State's exhibits #92a, #92b, and #92c; 62, 6472, 2-11; 6472, 17-25) A few months after the church building was purchased, Dana Flynn began attending with Steve Flynn and her family, (65, 6972, 12-13; 65, 6972, 16-17; 62, 6481, 8-21) which included her parents, Shirley and Norman Dreiling; her brothers, John, Mikel, and sometimes Steve Dreiling; and her sisters, Cheryl Cannfield, Sue Phelps and Brenda Arveson; and their children. (65, 6972, 20-25)

Praying in tongues was practiced when the Dreiling family attended and it was practiced by Dana Flynn, Brenda Arveson, Jerry Rollins and Charles Rollins. (65, 6973, 1-10; 62, 6483, 1-13) "Interpretation" occurred when messages were given in tongues and someone with the gift of interpretation would interpret in English for those

present. Jerry Rollins and Dana Flynn had the "gift." (65, 6974, 18-25; 6975, 1)

At one prayer meeting at Dana Flynn's home, a prophesy was given that Randall Sheridan was very evil, that Sheridan's father was the devil, and that "God would take care of Randy." (65, 6978, 16-22; 6979, 4-8; 6980, 1-9)

There was also evidence of an affair between Dana Flynn and Jerry Rollins. In November of 1990, Lee Anna Rollins, Jerry Rollins' wife, found a packing slip from an adult mail order house. It listed items ordered by Jerry Rollins and sent to the residence of Dana Flynn. (59, 5643, 8-25; 5644, 5-9; 5689, 12-24; 79, State's exhibit #64b, #64; 66, 7199, 19-24) In February of 1992, Lee Anna hired an attorney to represent her in divorce proceedings against Jerry Rollins. (65, 7002, 17-20) She gave a copy of the invoice to her attorney to document her accusation that Jerry Rollins was having an extramarital affair with Dana Flynn. (65, 7001, 10-25; 7002, 1; 79, State's exhibit #65, #39)

Relevancy of the Petitioner's Religious Beliefs

The State of Kansas contends that the petitioner's religious beliefs were relevant to the murder trial. The victim had been described as "evil" and a "devil" by the defendant's church. (62, 6494, 21-24; 6495, 4-7) The minister of the church was the source of the sexual molestation allegations. (65, 6978, 16-22; 6798, 4-8; 6980, 1-9) The State also presented evidence in pretrial motions related to the influence that the minister had over his congregation. (Brief on Relevance of Evidence of Leadership and Control, 2, 391-408) Religion was not on trial; rather, the State introduced evidence of the petitioner's

religious beliefs to establish motive. (74, 8613, 18-20; 75, 8755, 22-25; 8756, 1-4; 8759, 23-25)

The jury was carefully selected to avoid religious prejudice. (33, 83, 18-25; 19-23; 34, 290, 11-13; 332, 14-21; 34, 423, 16-17; 35, 497, 16-19; 559, 20-24; 600, 14-22; 678, 14-17; 36, 750, 13-17; 915, 15-16; 37, 990, 7-12; 36, 1230, 2-14; 39, 1284, 23-25; 1285,1-25; 1304, 12-18; 1306, 17-23; 40, 1513, 1-7; 38, 1535, 3-25; 1536, 1-25; 1540, 12-25; 1548, 8-25; 1549, 1-25; 1550-1553; 1582, 11-25; 1583, 1-12; 41, 1732, 4-15; 1739, 19-22; 1819, 15-25; 1831, 8-24; 42, 1933, 8-24; 1942, 9-17; 2007, 7-21; 2039, 15-25; 2040, 1-17; 43, 2151, 21-25; 2235, 11-20) Religion was not on trial. This was directly pointed out to the jury by the prosecutor on several occasions. (75, 8755, 22-25; 8756, 1-4; 8759, 23-25)

Ruling of the Kansas Supreme Court

In its ruling, the Kansas Supreme Court upheld the convictions, noting the circumstantial nature of the evidence but finding sufficient evidence to convict the petitioner. *State v. Dreiling*, ___ Kan. ___, 54 P.3d 475, 491 (2002). The petitioner asserted that his First Amendment right to religious freedom and the Kansas statute on privilege concerning religious belief were violated. The Kansas Supreme Court stated concerning these arguments:

> "Mikel's First Amendment argument and argument under K.S.A. 60-430 fail. The religious practices themselves are not relevant. However, when a defendant's religious practices involve beliefs and statements such as that the victim molested a child, the victim was evil, the victim was the devil, and God would "take care" of the

victim, they become relevant in a criminal prosecution because they tend to establish a motive for the defendant to commit the crime." *State v. Dreiling*, ___ Kan. ___, 54 P.3d 475, 499 (2002)

REASON WHY THE PETITION SHOULD BE DENIED

The admission of evidence regarding the petitioner's religious beliefs and practices was relevant to establish motive for murder and the case presents only an issue of application of the existing law.

The petitioner argues that this case represents an issue of first impression because this Court has not previously decided whether it is a violation of the First Amendment when evidence of a defendant's religious beliefs and practices is admitted in a criminal prosecution for the purpose of establishing the defendant's motive to commit a crime, without showing that the defendant's religious beliefs inherently promoted such activity. (See petitioner's brief, 24-25)

The admission of evidence regarding a person's beliefs has previously been decided by this Court. This Court has clearly stated: ". . . the Constitution does not erect a *per se* barrier to the admission of evidence concerning one's beliefs and associations simply because those beliefs and associations are protected by the First Amendment." *Dawson v. Delaware*, 503 U.S. 159, 165, 112 S.Ct. 1093, 117 L.Ed.2d 309 (1992). See also, *Barclay v. Florida*, 463 U.S. 939, 942-44, 103 S.Ct. 3418, 3420-3421, 77 L.Ed.2d 1134 (1983) (Racial hatred a relevant consideration as an aggravating factor at sentencing); *United States v. Abel*,

469 U.S. 45, 53, 105 S.Ct. 465, 469, 83 L.Ed.2d 450 (1984) (Religious association admissible to show bias).

The First Amendment guarantees of individual freedom of belief and expression are balanced against the legitimate public interests in law, order, and safety. See generally, *Cox v. Louisiana*, 379 U.S. 559, 85 S.Ct. 476, 486, 13 L.Ed.2d 487 (1965) (Picketing can be reasonably be restricted outside of a courthouse).

Federal and state courts have shown the ability to reach a balance. For example: *United States v. Perl*, 584 F.2d 1316 (4th Cir. Md. 1978) (Court properly instructed that moral convictions are not a defense to a crime); *Bolling v. Superior Court for Clallam County*, 16 Wash.2d 373, 133 P.2d 803 (1943) (Removing children from school because they won't salute the U.S. flag violates the First Amendment); *State ex. rel. Holcomb v. Armstrong*, 39 Wash.2d 860, 239 P.2d 545 (1952) (Requirement that children receive a lung x-ray before attending public school does not violate freedom of religion under the First Amendment).

United States v. Beasley 72 F.3d 1518, 43 Fed. R. Evid. Serv. 723 (11th Cir. 1996) involved the question of whether admission of evidence of religious beliefs in a criminal case violated the First Amendment. The Court of Appeals for the Eleventh Circuit stated, "A person's beliefs, superstitions, or affiliation with a religious group is properly admissible where probative **of an issue** in a criminal prosecution." *Beasley,* at 1527 (emphasis added). See also, *Aliwoli v. Carter*, 225 F.3d 826 (7th Cir. Ill. 2000) (Prosecutor questions concerning faith were proper, and were related to motive and state of mind).

The admissibility of relevant evidence of religious belief and practice, and even of specific religious figures, has long been part of American jurisprudence. Many historic and popularized cases involved the admissibility of such evidence. These decisions often turned not on the specific constitutional question presented here, but on the more basic underlying issue of the relevancy of such evidence, and whether the probative value of such evidence was outweighed by prejudicial effect. See *U.S. v. Sun Myung Moon*, 718 F.2d 1210, 52 A.F.T.R.2d 83-6026, 83-2 USTC P 9581, 14 Fed. R. Evid. Serv. 133 (2nd Cir. N.Y. 1983); *U.S. v. Barlow*, 41 F.3d 935 (5th Cir. 1994); At the state level, see, *State v. Ryan,* 233 Neb. 74, 444 N.W. 2d 610 (1989); *cert. denied*, 498 U.S. 881, 111 S.Ct. 216, 112 L.Ed.2d 176 (1990); *cert. denied*, 529 U.S. 1100, 120 S.Ct. 1836 (Mem), 146 L.Ed.2d 780 (2000); *People v. Manson*, 61 Cal.App.3d 102, 132 Cal. Rept. 265, Cal.App. 2 Dist. (1976); *cert. denied*, 430 U.S. 986, 97 S.Ct. 1686 (Mem), 52 L.Ed.2d 382; *cert. denied*, 435 U.S. 953, 98 S.Ct. 1582 (Mem), 55 L.Ed.2d 803 (1978).

Thought control and influence cannot be seen. It must be shown by example. In these cases, like the present case, it was noted that the unusual fact pattern presented would not be comprehensible without an understanding of the environment created by the religious figure or leader. See *State v. Ryan*, 233 Neb. 74, 104. See also *U.S. v. Sun Myung Moon*, 718 F.2d 1210, 1233; *People v. Manson*, 61 Cal.App.3d 102, 129-132. Some state courts opinions have dealt specifically with evidence of religious belief or practice as motive. *People v. Cooks*, 141 Cal.App.3d 224, 326, 190 Cal.Rptr. 211, Cal.App. 1 Dist. (1983) (Religious beliefs were relevant to show motive and evidence of conspiracy to commit murder, and there was no violation

of First Amendment rights); *State v. Potter*, 197 W.Va. 734, 756, 478 S.E.2d 742 (1996) (Decided on State statutory grounds; minister convicted of child molestation).

The Kansas Supreme Court recognizes that admission of evidence of religious practice is not always appropriate. The Kansas Supreme Court understands the rule: "[A]lthough there is no *per se* barrier to the introduction of a person's membership or participation in a religious group or association, to be admissible, such evidence should be related to the commission of the crime charged, or should be used to show a person's possible bias or motive." *State v. Leitner*, 272 Kan. 398, 414, 34 P.3d 42 (2001), citing *Dawson v. Delaware*, 503 U.S. 159, 168.

In *Leitner*, the Kansas Supreme Court stated, ". . . because the evidence of Leitner's practice of witchcraft was more prejudicial than probative, it had no direct relevance to the crime charged, and did not serve to impeach Leitner, no reasonable person would take the view adopted by the trial court in admitting evidence of Leitner's participation in witchcraft." 272 Kan. 398, 416, 34 P.3d 42 (2001). The constitutional question turns on the evidentiary issue of relevancy, a fact question in each individual case for the trial court. The Kansas Supreme Court properly considered and applied the law.

This Court has clearly stated the conditions under which a petition for *certiorari* will be granted.

> "Review on a writ of *certiorari* is not a matter of right, but of judicial discretion. A petition for a writ of *certiorari* will be granted only for compelling reasons. The following, although neither controlling nor fully measuring the Court's discretion, indicate the character of the reasons

> the Court considers: (a) a United States court of appeals has entered a decision in conflict with the decision of another United States court of appeals on the same important matter; has decided an important federal question in a way that conflicts with a decision by a state court of last resort; or has so far departed from the accepted and usual course of judicial proceedings, or sanctioned such a departure by a lower court, as to call for an exercise of this Court's supervisory power; (b) a state court of last resort has decided an important federal question in a way that conflicts with the decision of another state court of last resort or of a United States court of appeals; (c) a state court or a United States court of appeals has decided an important question of federal law that has not been, but should be, settled by this Court, or has decided an important federal question in a way that conflicts with relevant decisions of this Court." (Rule 10)

In this case, no such circumstance, and therefore no compelling reasons exist to grant a writ of *certiorari*.

Religious beliefs, particularly fanatical ones, do influence human behavior. The jury could not have understood this Kansas case in a vacuum. The prophesies of molestation, atmosphere created by the "prophet" Rollins, and self-righteous statements that Sheridan was "evil" and deserved to die, were all relevant to this trial, regardless of whether or not evidence was presented that Rollins ordered the murder. The jury would have laughed the prosecution out of the courtroom for the notion that Sheridan was in part killed by Dreiling and Flynn because he was believed to be a "devil" without evidence of the church, Rollins' teachings, and the practices, prophesies, and beliefs.

In addition, the devil references and church practices were part and parcel of the underlying custody battle. J.F. and A.S. both made references to devil fear. The effect of the church on the children and church practices were issues in the underlying custody battle. Even if the church practices were not directly relevant, which they are, they certainly became relevant by reason of the role the church practices played in the underlying custody battle. The State could not show the nature, extent, and viciousness of this custody battle without an explanation of what it involved.

The petitioner alleges that evidence of religious practices was introduced only to show motive. In fact, evidence of the religious practice of speaking in tongues was introduced to prove perjury conspiracy charges as well. In its ruling, the Kansas Supreme Court found that the conspiracy to commit perjury charges and the other charges were properly joined. *Dreiling*, 54 P.3d 475, at 496. The Court also stated:

> "While speaking in tongues and prophesying are facially innocuous, when they involve labeling someone as "evil" and "the devil" and inform the audience that in effect God does not want a man to have custody of his daughter, then they become relevant to the motive for murder, and, therefore, relevant evidence." *Dreiling*, 54 P.3d 475, at 499.

These criminal cases which involve evidence of religious practice necessarily turn on specific facts. There is no *per se* rule – and cannot be. Evidence of motive is simply another form of relevant evidence in a murder case.

The specific question presented in this petition does not therefore raise a new issue of law.

CONCLUSION

WHEREFORE, for the reasons stated above, respondent respectfully prays this Court deny Mikel J. Dreiling's Petition for a Writ of *Certiorari*.

Respectfully submitted,

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